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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

V.

THOMAS J. STAHLEY,

Defendant and Appellant.

B165202

(Los Angeles County Super. Ct. No. PA 042064)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Alan D. Tate, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Thomas J. Stahley is appealing his conviction for second degree robbery and making criminal threats. He contends that his conviction must be reversed because (1) he did not make a knowing and intelligent waiver of counsel before representing himself at trial, and (2) his pretrial motion to exclude the identification by the robbery victim should have been granted. Finding no error, we affirm.

PROCEDURAL HISTORY

The information charged appellant with second degree robbery (Pen. Code, § 211)¹ and making criminal threats (§ 422). It further alleged that the offenses were serious felonies (§ 1192.7, subd. (c)); he personally used a firearm (§§ 12022.53, subd. (b), 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)); he had three prior convictions which had resulted in prison terms (§§ 667.5, subd. (b); 1203, subd. (e)(4)); and a previous conviction for robbery was a strike, within the meaning of the Three Strikes law. (§§ 1170.12, 667.)

Appellant represented himself below after his *Faretta*² motion was granted. He filed numerous pretrial motions, among which were successful motions for appointment of a defense expert on the issue of eyewitness identification and for bifurcation of the prior felony conviction charges. Immediately before trial, his motion to suppress the eyewitness identification was denied.

The jury found appellant guilty as charged. The trial court found the charged prior convictions to be true. He was sentenced under the Three Strikes law to a total term of 25 years in prison.

A timely notice of appeal was filed.

FACTS

Prosecution Testimony

Around 8:15 a.m. on July 12, 2002, Linda Donnelly was working at the garden center of a Kmart store in Sunland. Appellant walked past her as she watered some plants. The

All subsequent code citations are to the Penal Code unless otherwise noted.

² Faretta v. California (1975) 422 U.S. 806 (Faretta).

weather was hot, and she thought it odd that he wore a knit stocking cap pulled down to his eyebrows.

A few minutes later, Donnelly saw appellant near the cash register. She asked him if he wanted help. He pointed to a can of motor oil which was on the counter. She scanned the can on the register and turned towards him to give him the price. He pushed her chest with one hand and forced her to her knees. Holding a gun at her temple, he twice threatened to "blow [her] f---ing head off" if she did not give him money. She told him that she had no money and could not open the drawer of the cash register. He shoved her into some shelves, which caused merchandise to fall on her. He then ran off with the can of oil.

About three weeks later, on August 4, 2002, Donnelly was taking a cigarette break in front of the store when she saw a white convertible pull up in the parking lot. A woman was driving; appellant was in the passenger seat. Donnelly went into the store and told the manager. A store security person went outside and wrote down the car's license plate number, which was given to the police.

The registered owner of the car was a woman whose address was 10 or 15 minutes away from the store. The police found appellant standing on the grass in front of the house at that address. He was detained and handcuffed. The police drove Donnelly there. She saw appellant, another man, and a woman who were being brought out in handcuffs. She was "110 percent sure" that appellant was the man who had robbed her. The police did not show her photographs or make suggestive statements before she made this identification. She later identified appellant's photograph from a group of six photographs which a parole officer showed her, and also identified him at the preliminary hearing.

Defense Evidence

Donnelly told the police that the robber had brown eyes, but appellant's eyes are blue. Appellant had tattoos on his arms which were not mentioned in Donnelly's description of the robber.

Dr. Robert Shomer testified regarding psychological factors which could cause an eyewitness's identification to be unreliable. Witnesses who have been in life-threatening situations during a crime might be inaccurate about details. The procedures regarding

eyewitness identification had to be done carefully to avoid increasing the risk of unreliability. A one-person presentation of a suspect to a witness was inherently suggestive. Once an identification had been made, an individual would become increasingly confident of its accuracy, when asked to repeat it on future occasions.

DISCUSSION

1. The Faretta inquiry was adequate.

Appellant maintains that the trial court conducted an inadequate inquiry before permitting him to waive counsel and represent himself, thereby violating his rights under the due process clause of the Sixth Amendment, as applied through the Fourteenth Amendment, and article I, section 15 of the California Constitution.

The record shows that on August 16, 2002, prior to the preliminary hearing, appellant asked to represent himself. The trial court first discussed the maximum possible sentence with the prosecutor. It ascertained that both of the charged counts were strikes, and that appellant already had a strike. Adding in the penalty for the firearms use allegation, the maximum possible sentence was 24 or 25 years in prison.

Appellant indicated that he understood the sentence and still wanted to represent himself.

A recess ensued in which appellant filled out a written *Faretta* questionnaire. The following discussion then ensued:

"The Court: Okay. Back on the record.

"The court has received a waiver of rights to a lawyer, commonly known as a F[a] retta form. The defendant has indicated that he understands the charges, understands the elements, and the defenses to the crime.

"Sir, can I inquire what your highest level of education is?

"The Defendant: 11th grade.

"The Court: Okay. You know most lawyers go four years of college and then three years of law school before they will even -- any public lawyer would be assigned to a case like this, to be, quote, a felony lawyer within the public defender's office or the alternate public defender's office. They would have to have served probably three to five years doing

low-grade cases before they would receive any high-grade cases. So you're probably looking at somebody with seven years of post-high school education and three to five years of experience as a lawyer before they'd even pick up such a case.

"This particular case -- we're throwing numbers around, but it's in the low 20's to mid 20's. That's your exposure on this case if you lose; okay?

"The Defendant: Yes, sir.

"The Court: Both of the charges are strikes.

"The Defendant: Yes, sir.

"The Court: Attempted robbery and terrorist threats are now both strikes, and you could come out of this case with two additional strikes, which could seriously send you away for a very long time.

"The Defendant: Yes, sir.

"The Court: I'm telling you, and basically begging you on behalf of your own self not to do this to yourself, not to go alone. I think it's a terrible, terrible, terrible mistake to do this. I've only been doing this for 25 years, but I think this is a terrible mistake on your part.

"Now, if you want to do it, the law says I have to let you do it; okay?

"The Defendant: Yes, sir.

"The Court: And I don't want to do it, but I can make you pro per. I can give you -- I think it's \$40, and I can give you an investigator, et cetera, but -- and I'll give you, you know, pro per status at the jail. But, you know, it's very difficult to sit where you're sitting and ask questions and represent yourself and asking the witnesses questions about yourself. I mean, when you're going to be doing cross-examination.

"The Defendant: I have that under control.

"The Court: Pardon?

"The Defendant: I'll be all right, sir.

"The Court: All right. So even though I'm strongly -- and I'm writing in the docket, 'strongly advising you not to do this,' but if you want -- is that what you want to do?

"The Defendant: Yes, sir.

"The Court: You're [sic] -- pro per status is granted."

We granted appellant's request for judicial notice of the written *Faretta* form on July 31, 2003. It shows that appellant was asked a series of separate questions regarding whether he knew he had a right to a court-appointed lawyer, understood the dangers of representing himself, and knew the elements of the offense and possible defenses. He still wanted to represent himself after reading the questions. He wrote "Yes" after each question, except for writing "No" after one of the listed dangers of self-representation: "You are too involved in your own case to make the right decisions in handling that case[.]" He signed and dated the form below the words: "I have read all the questions above. I understand all the questions."

On appeal, appellant maintains that the trial court should have conducted a more thorough oral inquiry and reviewed the *Faretta* form in detail with appellant, rather than relying on the written form. His argument lacks merit.

Faretta, supra, 422 U.S. at page 807 established that a criminal defendant who wishes to represent himself has the right to conduct his own defense. However, a knowing and intelligent waiver is required before a criminal defendant gives up the traditional benefits of counsel. A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (Faretta, supra, 422 U.S. at p. 835.)

"On appeal, we examine de novo the whole record -- not merely the transcript of the hearing on the *Faretta* motion itself -- to determine the validity of the defendant's waiver of the right to counsel." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.)

"No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation; the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Koontz, supra*, 27 Cal.4th at p. 1070; *People v. Lawley* (2002) 27 Cal.4th 102, 140.)

In contrast, an explicit enumeration and waiver of constitutional rights is required when a defendant pleads guilty. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122, 132-133, disavowed in part in *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 306-307, fn. 16, and overruled in part in *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) The absence of an equivalent explicit requirement for a *Faretta* waiver, as opposed to a guilty plea, invalidates appellant's attempt to support his argument with the *Boykin-Tahl* line of cases.

The trial court below apprised appellant of the severity of the potential penalty and the court's belief that he was making a mistake by waiving counsel. The written waiver form incorporates most of the advisements recommended in *People v. Lopez* (1977) 71 Cal.App.3d 568, 572-574. This case is distinguishable from *People v. Noriega* (1997) 59 Cal.App.4th 311, 319-320, in which no warnings or advisements were given. While the trial court did not go over each item on the form with appellant, it received the form and observed that it showed that appellant understood the charges and defenses. The advisements in the form fully warned appellant of the complexities of the task he was undertaking. (*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1322.) The combination of the oral inquiry and the written waiver form establish that appellant made a knowing and voluntary choice to represent himself.

Moreover, the record shows that appellant filed and argued numerous motions, examined and cross-examined witnesses, interposed objections, and argued the case to the jury. He was given the benefit of stand-by counsel. The case was not unusually complicated, as it chiefly involved the validity of the eyewitness identification by Donnelly. There was no issue regarding appellant's mental capacity. Therefore, taken as a whole, the record supports the finding of a knowing and intelligent waiver of counsel.

2. The motion to suppress the identification was properly denied.

Appellant argues that Linda Donnelly's identification was the result of an impermissibly suggestive field showup and was tainted when a parole officer subsequently showed her photographs, thereby letting her know that appellant was on parole.

It was appellant's burden to show that the identification procedures utilized by law enforcement were unfair. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) He has failed to meet that burden.

At the Evidence Code section 402 hearing on the motion to suppress the identification, Donnelly described the robbery on July 12 and her recognition of appellant in the white convertible on August 4. She told the manager, and a store security person got the license plate. Later that day, the police drove her to a house and led out three people in handcuffs. The first was a woman, the second a man, and the third another man, appellant, whom she identified as the robber. She said the police had not shown her any photographs, told her who she would be seeing, or indicated that the person might or might not be the robber

Donnelly further testified that on a later date she picked out appellant's picture from a series of photographs which a parole officer showed her. That was the only time she was shown photographs. She was subpoenaed to testify at a parole hearing, but it was postponed. On the day of the preliminary hearing, she did not hear any discussion between the court and the prosecutor regarding the defendant's appearance.

Police Officer Tamura testified that when he drove Donnelly from the store to the house, he advised her that a possible suspect was being detained who might or might not have committed the crime. He also told her that the suspect was being detained so she could eliminate or identify him. Donnelly told him she was positive that appellant was the person who tried to rob the store.

In reviewing the above evidence, we follow the rule that single-person showups are permitted as long as the circumstances are not unduly suggestive. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.) Donnelly independently recognized appellant in the parking lot on August 4, without any prompting by the police. There was no evidence at the hearing that the police made any improper statements to her prior to her identification of appellant at the showup at the house later that day. Either they told her nothing, as she testified, or they told her that appellant might or might not be the suspect, as Officer Tamura testified. Under either version, no suggestive statements were made. Appellant was handcuffed, but the

mere presence of handcuffs on a detained suspect does not taint an identification. (*Ibid.*; *In re Richard W.* (1979) 91 Cal.App.3d 960, 970.) The potential suggestiveness of the situation was reduced by the fact appellant was one of several handcuffed people that Donnelly was shown. The use of handcuffs was reasonable where the crime involved a gun, and the police further acted reasonably in transporting Donnelly to the house for an immediate determination of whether the correct person had been taken into custody.

Appellant also complains that Donnelly should not have been shown pictures by a parole officer, as the fact he was on parole would strengthen her belief in the identification she had made. Assuming that this argument can be raised for the first time on appeal, it lacks merit. There was no reason the parole officer could not contact Donnelly prior to a parole hearing, and no evidence of undue suggestiveness by that officer.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

RUBIN, Acting P.J.

BOLAND, J.